

*American Zurich Ins. Co. and Zurich American Ins. Co. v.
J. Crisman Palmer and GPNA*

*Colin F. Campbell
December 19, 2022*

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<p>1 contains, I believe, all the materials that are listed</p> <p>2 in my report. So I have a section on the billing</p> <p>3 records, pleadings of the bad faith case, pleadings of</p> <p>4 the malpractice case, discovery in the bad faith case,</p> <p>5 discovery in the malpractice case; and I have somewhat</p> <p>6 in chronological order, although not entirely in</p> <p>7 chronological order, emails and correspondence. I</p> <p>8 think I have the expert reports, mine and your expert,</p> <p>9 the Hinshaw invoices, and I think I have the</p> <p>10 depositions of Mr. -- if I pronounce his name</p> <p>11 incorrectly, please correct me -- Asberick?</p> <p>12 Q Abourezk.</p> <p>13 A Abourezk. And Mr. Palmer.</p> <p>14 Q Other than the materials that you just referenced, will</p> <p>15 you agree that, at least during this deposition, you</p> <p>16 will not reference any other materials without telling</p> <p>17 me?</p> <p>18 A Yes.</p> <p>19 Q And perhaps it's natural -- well, bad question. Would</p> <p>20 you also agree not to access your phone or your</p> <p>21 computer other than for purposes of using the screen</p> <p>22 for Zoom during this deposition without telling me?</p> <p>23 A Yes.</p> <p>24 Q Now, as I understand it, you're currently a practicing</p> <p>25 attorney. Is that right?</p>	<p>1 I was a judge at the time I took the trip.</p> <p>2 Q Any other times that you recall visiting South Dakota?</p> <p>3 A Not that I can recall.</p> <p>4 Q During your time in private practice, both before you</p> <p>5 took the bench and since you've returned to private</p> <p>6 practice, have you ever represented Zurich directly as</p> <p>7 a defendant? I'll start there before we talk about</p> <p>8 their insureds.</p> <p>9 A Represented Zurich in a lawsuit or --</p> <p>10 Q Correct.</p> <p>11 A You know, I've practiced 45 years. Nothing in</p> <p>12 particular comes to mind, although I was certainly</p> <p>13 familiar with Zurich before this case, and I don't know</p> <p>14 whether because they may have been a carrier on a case</p> <p>15 I had or -- or they could have appeared in front of me</p> <p>16 as a judge. I just don't recall.</p> <p>17 Q So I asked about Zurich direct. Do you recall, during</p> <p>18 your time in private practice, ever having a</p> <p>19 significant portion of your practice representing</p> <p>20 Zurich's insureds?</p> <p>21 A No.</p> <p>22 Q What is the name of the law firm that you currently</p> <p>23 work for?</p> <p>24 A I work for the firm of Osborn & Maledon.</p> <p>25 Q Do you know whether other lawyers in your law firm</p>
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<p>1 A I am.</p> <p>2 Q In what states are you licensed?</p> <p>3 A I'm licensed in states -- in Arizona and in California.</p> <p>4 I'm licensed in different federal courts.</p> <p>5 Q Have you ever appeared in any proceedings in</p> <p>6 South Dakota pro hac vice?</p> <p>7 A No.</p> <p>8 Q Have you ever been licensed in the state of</p> <p>9 South Dakota?</p> <p>10 A No.</p> <p>11 Q Have you ever been to South Dakota?</p> <p>12 A Yes. I've been through Sioux Falls.</p> <p>13 Q What brought you to Sioux Falls?</p> <p>14 A My wife and I have several children, and my wife, on</p> <p>15 one of our vacations, wanted to bring our girls to the</p> <p>16 Little House on the Prairie sites, and one of those</p> <p>17 sites is in South Dakota. I think we drove across</p> <p>18 South Dakota from Sioux Falls in the east all the way</p> <p>19 over to Pierre and Rapid City on the west. And I can't</p> <p>20 remember the particular name of the town, somewhere in</p> <p>21 the middle of the state we went to, which had the</p> <p>22 particular Little House on the Prairie site she was</p> <p>23 interested in.</p> <p>24 Q Approximately how long ago was that?</p> <p>25 A Oh, gosh. That would have been between 1990 and 1995.</p>	<p>1 represent Zurich in claims direct to them over the last</p> <p>2 couple years?</p> <p>3 A No, I don't.</p> <p>4 Q Would you consider Zurich to be a client of the law</p> <p>5 firm?</p> <p>6 A No. I could run a conflict check if you would like,</p> <p>7 but I don't -- to my knowledge -- I mean, if something</p> <p>8 came across the board on a conflict, I wouldn't think</p> <p>9 we'd have a conflict. And I don't think we've</p> <p>10 represented them.</p> <p>11 Q As part of your experience in private practice, have</p> <p>12 you appeared as counsel of record defending any bad</p> <p>13 faith cases?</p> <p>14 A You have to understand that in most all contract cases,</p> <p>15 there's an allegation of breach of the duty of good</p> <p>16 faith and fair dealing, and I have done contract</p> <p>17 defense cases. So I'm sure there's some allegations of</p> <p>18 bad faith and fair dealing in contract cases. In terms</p> <p>19 of insurance bad faith, I can recall suing an insurance</p> <p>20 company for bad faith and fair dealing. But I do both</p> <p>21 plaintiff and defense work, and nothing else comes to</p> <p>22 mind.</p> <p>23 Q The plaintiffs case which you were referring to, do you</p> <p>24 recall approximately when that was?</p> <p>25 A Within the last three years.</p>

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<p style="text-align: right;">Page 13</p> <p>1 bench trial or an arbitration involving the standard of 2 care governing attorneys? 3 A The one I testified in arbitration had to do with the 4 reasonableness of attorneys' fees that were being 5 charged, and the case I testified to over Zoom at a 6 bench trial had to do with the reasonableness of the 7 settlement. 8 Q How about at deposition? Do you recall being deposed 9 in any cases in which you offered opinions regarding 10 the standard of care of an attorney? 11 A Nothing comes to mind right now, but I'd have to go 12 back and review my file. 13 Q Other than this case and then the other case involving 14 Mr. Hoyt, have you been engaged by a lawyer 15 representing Zurich to be an expert in any other 16 matters? 17 A Those are the only two matters I've been retained by 18 Zurich. You know, I have -- I'm involved in a case 19 right now where I'm an expert witness on the standard 20 of care for an attorney -- actually, for a law firm, 21 but their case is -- I've given a preliminary affidavit 22 as required by Arizona law. I think the case is in 23 discovery right now. 24 Q Does Arizona law require that an affidavit be provided 25 in conjunction with filing of the complaint to</p>	<p style="text-align: right;">Page 15</p> <p>1 <u>Exhibit 115</u>. 2 (<u>Exhibit 115</u> is marked for identification.) 3 MR. SUTTON: Have you got it, Scott? 4 MR. HOYT: Yes. 5 BY MR. SUTTON: 6 Q Does <u>Exhibit 115</u> contain all of the opinions that 7 you're proffering in this case? 8 A I believe so. I may articulate them more clearly in a 9 conversation, but I believe so. 10 Q Generally explain to me the work that you did in 11 forming your opinions in this matter. 12 A Well, I worked with a younger partner in the firm on 13 this case, Mr. Molinar. So we were sent materials. We 14 reviewed the materials, we drafted an opinion, and you 15 got a copy of the final draft. 16 Q What was the division of responsibility between you and 17 Mr. Molinar in the work that was performed in forming 18 the opinions in this case? 19 A Well, we discussed the case. He would have done the 20 first draft of the opinion. I would have reviewed and 21 revised it. 22 So that was sort of the division of 23 responsibility. He would have been the first one to 24 review the records. I would have been the second one 25 to review the records.</p>
<p style="text-align: right;">Page 14</p> <p>1 establish failure to comply with the applicable 2 standard of care? 3 A Not with the filing of the complaint, but under Arizona 4 state law, we have a rule, Rule 26.1, which is initial 5 disclosure of evidence. It's a little more rigorous 6 than the federal rule. But the preliminary affidavit 7 has to be filed with the Rule 26.1. 8 Q Now, as I understand it, you're being compensated for 9 your work here today, correct, or in this case? 10 A Correct. 11 Q And your report indicates that you're charging \$775 an 12 hour. Is that right? 13 A Yes. That's my regular hourly rate. 14 Q Can you give me an estimate as to the total amount 15 you've incurred in fees to date on your work in this 16 matter? 17 A No, I really can't. I could pull the billings and get 18 you that information, but I don't have it off the top 19 of my head. 20 Q Do you have a copy of your report with you or before 21 you, Colin? 22 A I do. Let me turn to it. It's in this three-ring 23 notebook I was telling you about. 24 I have it in front of me. 25 Q In your report -- first of all, let's mark that as</p>	<p style="text-align: right;">Page 16</p> <p>1 Q Looking at page 2 of your report, continuing through 2 page 6, there are 79 individual documents that are 3 referenced as having been reviewed. 4 My first question is, do you recall reviewing 5 anything else in forming your opinions other than those 6 items? 7 A There are 79 items listed here. I don't recall 8 reviewing anything else, but I haven't sat down and 9 compared this list with everything I have in this 10 notebook in front of me. 11 Q And in fairness, I'll acknowledge that this list does 12 not include Mr. Hieb's expert disclosure because that 13 was provided after your report. I assume you've 14 reviewed that. 15 A Yes, I have. 16 Q Other than Mr. Hieb's expert disclosure, do you recall 17 reviewing any other documents after you prepared your 18 report in this case? 19 A I just don't recall if anything came in after we did 20 our report. I don't think so. 21 Q The 79 individual documents, or groupings of documents, 22 on pages 2 to 6, have you personally reviewed all of 23 those documents? 24 A I'm pretty sure most of them I have reviewed or 25 skimmed. I put more emphasis on some rather than</p>

<p style="text-align: right;">Page 17</p> <p>1 others. So, for example, I probably spent more time 2 with the billing records because the billing records 3 give a chronological summary, really, of what the 4 attorneys did on a case. So Mr. Palmer's billing 5 records I spent time -- probably more time there. I 6 also spent more time with the emails and correspondence 7 with the client. I also probably spent more time on 8 the depositions of Mr. Palmer and Mr. Abourezk. 9 So I gave less emphasis on -- you know, for 10 example, the Hinshaw invoices really aren't 11 particularly relevant to the opinion I have. Although 12 there's a lot of background with respect to the 13 workmen's comp case, that's not necessarily informative 14 to my opinions. 15 Q I think you testified earlier that Mr. Molinar reviewed 16 all of the documents and did the first draft of the 17 report. Is that right? 18 A Correct. 19 Q And I assume he would have billed for his time. Is 20 that correct? 21 A That's our normal course. 22 Q And I don't blame you. I would have expected him to. 23 A Well, he also has a lower hourly rate than mine, and we 24 try, when we can, to use people with lower hourly 25 rates, as you can imagine.</p>	<p style="text-align: right;">Page 19</p> <p>1 what the key documents are as opposed to forming my own 2 opinions based on his draft and my review of the 3 records. 4 Q Will you please turn to page 6 of your report. 5 A I'm there. 6 Q There's an "undated chronology of underlying case" 7 identified as Item Number 78. Do you see that? 8 A I see it. 9 Q Do you know who prepared the chronology that's 10 referenced in that item? 11 A My recollection from the billing records is that 12 Palmer's law firm did a chronology or timeline. There 13 was an associate or a paralegal who worked on it, and 14 my recollection is, among the materials, we were 15 provided that chronology. It seems to have been worked 16 on several times within the firm. And I only say that 17 because my recollection is, of the billing records, 18 someone is working on a chronology, then he goes to it 19 and works on it again. In particular, I think when the 20 adjuster asked for more detail from the firm about the 21 case, I think that chronology was updated. 22 Q So I want to make sure that I've covered what you've 23 done in forming your opinions. You reviewed the 24 documents we've identified in your report. There was a 25 draft of the report created in which you worked with</p>
<p style="text-align: right;">Page 18</p> <p>1 Q I can appreciate that as well. 2 Would you anticipate that your billing entries 3 would capture when he reviewed those documents? 4 A The normal practice in the firm is to do daily billing 5 records and then they're inputted, and then at the end 6 of the month, the billing records are reviewed and 7 determination is made of whether to write off anything 8 for billing judgment. 9 So the billing records, I would anticipate, would 10 let you know what's done on any particular day. 11 Q How about your entries? I know that there's -- we all 12 have different levels of detail that we provide in the 13 narrative description of our entries. Sometimes it 14 matters even client to client. 15 Would you anticipate that your billing entries 16 would show the dates in which you reviewed the actual 17 documents which are contained on paragraphs [sic] 18 2 through 6 of your report? 19 A My practice is to do daily billing records, and they're 20 inputted. So I would anticipate my daily billing 21 records would say what I did. 22 Q Did you rely on Mr. Molinar to identify for you what he 23 perceived to be the key documents as part of the 24 review? 25 A I don't know if I would rely upon Mr. Molinar as to</p>	<p style="text-align: right;">Page 20</p> <p>1 Mr. Molinar in finalizing it. Is there any other work 2 that you performed in forming the opinions contained 3 within <u>Exhibit 115</u>? 4 A Well, I've been through the report several times. You 5 know, <u>things take place over time, and if there was --</u> 6 <u>something comes up, I'd need to review the materials to</u> 7 <u>refresh my recollection.</u> 8 I went back through all these materials in 9 preparation for my deposition. If we had meetings 10 where I was going to be talking with the client, I 11 would have gone through materials to refresh my 12 recollection again. 13 So I haven't just looked at them one time, is what 14 I'm suggesting. 15 Q Is there any other work you recall performing in order 16 to form your opinions in this matter? 17 A I don't know what you mean by "any other work." 18 Q You cite some legal resources in your opinion, 19 specifically the Rules of Professional Conduct as well 20 as the Restatement (Third) of Lawyers; is that right? 21 A Correct. 22 Q Is there any legal research that you performed other 23 than the reference to the Rules of Professional Conduct 24 and the Third Restatement of Lawyers? 25 A I don't think in terms of legal research. However, I</p>

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<p style="text-align: right;">Page 21</p> <p>1 have practiced for 45 years, and I have a great deal of 2 experience with respect to a wide variety of cases. 3 So, you know, I bring all of that into the opinions 4 that I form, and work I've done in the past involves 5 research with respect to the conduct of lawyers and 6 what's expected of lawyers. I sat on the State Bar 7 Ethics Committee, the State Bar here in Arizona, in the 8 1980s. I was the chair of that committee. When I was 9 a judge, I believe I also sat on the judicial ethics 10 committee and taught judicial ethics. I have a lot of 11 training and experience in what I believe goes into the 12 concept of the standard of care. 13 Q The Rules of Professional Conduct that you cite in 14 those reports, is that the model rule of professional 15 conduct or is that the South Dakota specifically 16 adopted rule? 17 A I would have to ask Mr. Molinar. I didn't -- he 18 didn't -- I'm not aware of any substantial difference 19 with respect to the standard of care rules he's citing 20 between South Dakota and the rest of the country. 21 Q Did you perform any South Dakota-specific research in 22 forming your opinions in this case? 23 A No, I don't think so. I've certainly read your 24 expert's report. 25 Q Let's turn to page 6 of your report, please.</p>	<p style="text-align: right;">Page 23</p> <p>1 factual basis for your opinions? 2 A Well, it's exactly what it says: It was just to state 3 the key facts with respect to the opinion. 4 Q How did you decide which facts to include in that 5 section and which ones not to include? 6 A Well, my opinion in the case is that Mr. Palmer did not 7 meet the standard of care with respect to his 8 representation of Zurich, and these are facts that bear 9 upon that opinion. 10 Q Are you aware of any other facts that you're relying 11 upon to form the basis for that opinion that are not 12 identified in pages 6 through 9 of your report? 13 A As I told you, I relied primarily upon the billing 14 records and the emails and correspondence. You know, 15 there may be certain -- you know, when you're looking 16 at the course of events, you can look at the billing 17 records and see when certain things happened. You can 18 look at the billing records when the correspondence was 19 done and then go to the correspondence. I mean, I'm 20 sort of relying on everything I was given. These were 21 key facts. That's all I'm trying to express. 22 Q Are you assuming, in forming your opinions in this 23 case, that all 22 of the facts that you've identified 24 are proven to be true? 25 A Well, we haven't had a trial in the case, of course.</p>
<p style="text-align: right;">Page 22</p> <p>1 A All right. 2 Q On page 6 through page 9 of the report, there are 22 3 specific key facts that you have identified; is that 4 right? 5 A Yes. 6 Q I recognize that Item 13's got a bunch of subparts, but 7 at least there's 22 specific paragraphs, correct? 8 A On the report there's 22 specific paragraphs, correct. 9 Q What were you trying to memorialize in those 22 10 specific paragraphs, or at least in that section of the 11 report? 12 A Well, as it says at the beginning -- it says "Key 13 Facts." So these are facts that -- I said it's my 14 understanding these facts are or will be supported by 15 competent evidence in the litigation, and then I've 16 identified and relied upon the following facts. So I 17 was trying to set forth key facts to the opinions I 18 reached. 19 Q Are there any facts -- I'm sorry. I thought you had 20 finished. Go ahead. I'm sorry. 21 A Well, I was just going to say, there may be additional 22 facts I relied upon, also. But, you know, we'd have to 23 talk about a particular subject, I guess. 24 Q Was it your intent in the Key Facts section to 25 memorialize the most important facts that form the</p>	<p style="text-align: right;">Page 24</p> <p>1 So I'm relying on emails, correspondence, billing 2 records, depositions. There's some source for most all 3 of these facts. 4 Q And I appreciate that. So in forming your opinions, 5 you're assuming that the jury will agree with you that 6 the evidence at trial proves all 22 of those facts, 7 correct? 8 A I don't think they need to find all 22 of those facts. 9 I mean, I haven't sat down and done a flowchart. 10 Q Was it your assumption that those facts will be proven 11 to be true when you formed your opinions? 12 A Well, take an example. I see here we have Fact 13 Number 19, which is that AZIC decided to retain Hinshaw 14 Culbertson as primary counsel in the suit. I mean, 15 that fact, whether it exists or not, doesn't affect my 16 opinions in the case. As I think I told you earlier 17 on, what Hinshaw did in the case doesn't really inform 18 my opinions. 19 Q Can you tell me, as you're sitting here today, whether 20 you assumed that all of the items within Number 1 21 through 22 were, in fact, true as you describe them? 22 A This sets forth sort of an outline of what happened in 23 the case, and in terms of being a chronological 24 outline, I think it's an accurate chronological outline 25 of the case.</p>

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<p>1 better position to opine on that issue than you? You</p> <p>2 sat through his deposition --</p> <p>3 A He would be in a better position to opine on the</p> <p>4 application of the parol evidence rule in South Dakota</p> <p>5 than I would.</p> <p>6 Q Yes. Would you agree with that?</p> <p>7 A Like I said, yes, he would be in a better position to</p> <p>8 opine as to the application of the parol evidence rule</p> <p>9 in South Dakota than I would.</p> <p>10 Q Will you please turn to page 7 of your report.</p> <p>11 A Yes.</p> <p>12 Q Item Number 11.</p> <p>13 A Yes.</p> <p>14 Q There's a statement that says, at the second sentence,</p> <p>15 "Given the number of files she was monitoring, when she</p> <p>16 received an Answer, she assumed she had already</p> <p>17 previously received it and approved it before it was</p> <p>18 filed."</p> <p>19 Do you recall what the evidence is that you were</p> <p>20 relying upon in making that statement?</p> <p>21 A No.</p> <p>22 Q Can you identify any evidence that indicates that?</p> <p>23 A You know, I don't -- I do not believe I have a copy of</p> <p>24 Ms. Wagner's deposition, and I don't know if we were</p> <p>25 advised about this or whether it comes from another</p>	<p>1 be a determination Zurich committed bad faith in the</p> <p>2 Leichtnam case?</p> <p>3 A My opinion in this case is that Mr. Palmer, at the</p> <p>4 inception of the case, when he was asked to do a 30-day</p> <p>5 report and a 90-day report -- he had formed his</p> <p>6 opinions, as I understand from his deposition, very</p> <p>7 early on in the case, and he did not provide the report</p> <p>8 to the adjuster, either on a 30-day report or a 90-day</p> <p>9 report, that he thought the case was essentially</p> <p>10 hopeless.</p> <p>11 The one time we have a -- I think the adjuster</p> <p>12 calls it a high-level analysis of the case, happens in</p> <p>13 December of the year the case was filed, and then I</p> <p>14 believe he files it sort of like right before</p> <p>15 Christmas. It's a letter. The adjuster writes back in</p> <p>16 early January asking for further information with</p> <p>17 respect to it, which is provided, I think, on or about</p> <p>18 the end of the month or February 1st, and then the</p> <p>19 adjuster goes to seek settlement authority. I think</p> <p>20 all of that should have been done early on in the case.</p> <p>21 Q As I reviewed your report in this case, it appears to</p> <p>22 me that -- and correct me if I'm wrong -- that your</p> <p>23 opinions are that Attorney Palmer failed to comply with</p> <p>24 the applicable standard of care in handling the defense</p> <p>25 of the case to allow Ms. Wagner to consider the early</p>
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<p>1 source.</p> <p>2 Q What other source could it be?</p> <p>3 A I don't know.</p> <p>4 Q Were you told to assume that fact from counsel?</p> <p>5 A I do not have that recollection.</p> <p>6 Q Do you know where that statement came from at all?</p> <p>7 A I do not.</p> <p>8 Q And you have not reviewed Ms. Wagner's deposition,</p> <p>9 correct?</p> <p>10 A I have not.</p> <p>11 Q Will you look at Item (k) on page 8 of your report,</p> <p>12 please.</p> <p>13 A Did you say (k)?</p> <p>14 Q Yeah. It'd be 13(k).</p> <p>15 A I'm with you.</p> <p>16 Q I just want to make sure I understand what you're</p> <p>17 writing here. So it says "Palmer never told Wagner</p> <p>18 that he had already concluded that there would be a</p> <p>19 finding of bad faith, to which Zurich had no defenses,</p> <p>20 preventing her from using that conclusion in her</p> <p>21 analysis or deciding whether to change counsel."</p> <p>22 First of all, did I read that correctly?</p> <p>23 A You read it correctly.</p> <p>24 Q Is it your understanding of the facts in this case that</p> <p>25 Attorney Palmer never told Dawn Wagner that there will</p>	<p>1 settlement offer. Is that right?</p> <p>2 A I'm not sure that completely captures my opinion.</p> <p>3 Q What else am I missing?</p> <p>4 A My opinion in this case -- I understand your expert</p> <p>5 wants to talk about the local culture, and I don't</p> <p>6 disagree with that. Adjusters hire local attorneys to</p> <p>7 find out about the local culture. But there's also an</p> <p>8 obligation that a counsel has to the adjuster and the</p> <p>9 insurance company itself.</p> <p>10 If this is a case, as your expert suggests, as</p> <p>11 Mr. Palmer suggests, is that it is of the utmost</p> <p>12 urgency that we consider settlement early in the case,</p> <p>13 which is not inconsistent with the guidelines that</p> <p>14 Zurich gave him -- I think it says in two different</p> <p>15 places in the guidelines Zurich is interested in early</p> <p>16 settlements -- I think the standard of care required</p> <p>17 Mr. Palmer to get on this case immediately to make</p> <p>18 decisions with respect to it and advise the adjuster,</p> <p>19 to give written communications to the adjuster so that</p> <p>20 Zurich can make good, quick decisions about an early</p> <p>21 settlement. That's not what happened in this case.</p> <p>22 I think Mr. Palmer fell below the standard of care</p> <p>23 by his failure to analyze the case early on and give</p> <p>24 adequate information to the carrier in writing --</p> <p>25 because an adjuster has to have a written file that the</p>

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<p style="text-align: right;">Page 33</p> <p>1 adjuster can bring to the higher-ups to get settlement 2 authority -- and my impression is that Mr. Palmer just 3 didn't see any urgency in doing that and didn't comply 4 with the client's directions. 5 Q Is there any other manner in which you're opining that 6 Attorney Palmer failed to comply with the applicable 7 standard of care? 8 A Well, we can go through it. 9 So, for example, when he didn't do a 30-day 10 report, that didn't comply with the standard of care. 11 When he didn't do a 90-day report, that didn't 12 comply with the standard of care. 13 When he filed an answer without showing it to the 14 client, when the client said they wanted to see it, 15 that didn't comply with the standard of care. 16 When he didn't document to the insurance adjuster 17 why he was filing no affirmative defenses or why he 18 thought the case, at an early stage, was hopeless and 19 he didn't communicate that, that didn't comply with the 20 standard of care. 21 We can go through different parts of the case -- 22 you know, they get the early settlement offer in 23 September, and he says it's important, you know, with 24 Michael, to deal with these early settlements, and in 25 the same letter I think he also says we don't have to</p>	<p style="text-align: right;">Page 35</p> <p>1 discovery disputes ongoing and those discovery disputes 2 can take an early settlement offer off the table, I 3 don't see Mr. Palmer recommending that we -- you know, 4 maybe we enter into a stipulation to stay discovery for 5 three months and do an intensive look at settling this 6 case before things get out of whack. 7 I mean, I guess what I -- what I feel falls below 8 the standard of care in this case is, what I hear 9 people are supposed to in South Dakota with respect to 10 this particular plaintiffs attorney I don't see 11 Mr. Palmer doing. 12 Q And so -- I'm sorry. Go ahead. 13 A He may, on a high level, say it's a difficult attorney 14 to work with, but he's not evaluating the case early; 15 he's not giving written documents to the adjuster so 16 the adjuster could get settlement authority early. It 17 seems like at every turn he sort of pushes it down the 18 road. 19 Q Now, you understand that a mediation did occur and the 20 settlement offer from plaintiff's counsel went from 21 \$325,000 prior to the mediation to \$2 million at the 22 mediation. Do you understand that to be the facts? 23 A Yes. I believe when they went -- whatever the early 24 settlement offer was that's set out in the letter had 25 moved to \$2 million or plus at the actual time of</p>
<p style="text-align: right;">Page 34</p> <p>1 respond right away. As far as I can tell, nothing 2 really happens between September of the year it's filed 3 and December before he finally writes an evaluation of 4 the case that the adjuster can look at and bring to her 5 superiors. You know, why mediation gets pushed off as 6 long as it does... 7 But when I read Mr. -- when I read your expert's 8 report and I read Mr. Abourezk's deposition, it seems 9 that competent counsel in South Dakota know that you 10 need to respond to these things very quickly and very 11 early, and I don't see, really, that happening where 12 the actions of Mr. Palmer are being communicated to the 13 adjuster. 14 Q The failures of standard of care that you've just 15 identified -- I just want to make sure that I know 16 everything that you intend to opine. Are there any 17 other opinions of the failure of the standard of care 18 that you have formed and are offering in this case? 19 A Well, I mean, listening to your expert this morning 20 saying that he doesn't like to do mediation, and 21 actually, the inference I drew from your expert's 22 opinion was that you do not want to go to him and ask 23 for mediation, that's disastrous, I don't see that in 24 Mr. Palmer's advice to the client. 25 With respect to the idea that if you have</p>	<p style="text-align: right;">Page 36</p> <p>1 mediation, I think, in October of 2016. 2 Q And so the failures of standard of care that you've 3 just testified about that prevented Zurich from 4 properly being able to settle the case -- and I 5 understand there's a myriad of things that you claim 6 Mr. Palmer failed to do -- did those all occur through 7 the time of his engagement up through the mediation? 8 A Well, certain things happened at particular times. For 9 example, the failure to give a 30-day report or a 10 90-day report happened at particular times. 11 I think, in general, the information the client 12 needed to take advantage of an early settlement offer 13 was not put in writing and communicated. 14 Q Are you opining that there was any failure of the 15 standard of care by Attorney Palmer after the 16 mediation? 17 A Well, there are things that happened after the 18 mediation that I think may bear upon his attitude 19 toward the case or his standard of care on the case but 20 not with respect to the case-within-the-case element 21 with respect to early settlement, if that makes sense. 22 Q Yeah, it does. So I just want to make sure that I 23 understand, because when I read your report, your 24 opinions appear to indicate to me that Attorney Palmer 25 fell below the standard of care on a series of things</p>

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<p style="text-align: right;">Page 37</p> <p>1 and that then, in the case within the case, caused harm 2 to the client because it prevented the client from 3 taking advantage of the early settlement offer. 4 Is that a fair synthesis of what your opinions are 5 in this case? 6 A It's a fair synthesis of my opinions with respect -- in 7 the context of the case within the case, let's just 8 say. 9 Q Are you opining that any of the other conduct by 10 Attorney Palmer after the mediation caused any harm to 11 Zurich? 12 A Well, I have the opinion that certain things, like not 13 consulting with the client about affirmative defenses, 14 fall below the standard of care. I do not have an 15 opinion, after the settlement conference, with respect 16 to the case within the case. 17 Q Tell me what things you are claiming Attorney Palmer 18 did after the mediation that form the basis for your 19 opinions he failed to comply with the applicable 20 standard of care. 21 A Well, it's sort of like the whole issue of affirmative 22 defenses, which are eventually -- as some of them are 23 determined waived; I think the magistrate ruled on one 24 of them -- again, I think it violates the standard of 25 care to not discuss with the client and present to the</p>	<p style="text-align: right;">Page 39</p> <p>1 reasonably, you have to prepare the case, you have to 2 research the case, you have to keep your client 3 informed of the case, all within the context of the 4 particular circumstances of the case. 5 Q Are you considering whether there are any 6 South Dakota-specific aspects of the applicable 7 standard of care in this case? 8 A Well, the circumstances of every case are important, 9 and from what I understand the particular South Dakota 10 aspects, the locality, as your expert refers to it, has 11 to do with this particular lawyer and how he practices. 12 Q Would you agree with me that that's an appropriate 13 consideration in evaluating the standard of care in 14 this case? 15 A Yes, I would. 16 Q Did you speak with any South Dakota lawyers in 17 preparation of your opinions in this matter? 18 A No. 19 Q Now, as I understand it, one of your opinions is that 20 Attorney Palmer fell below the standard of care in 21 failing to plead certain affirmative defenses in this 22 case. Is that true? 23 A I think you misstated it. 24 Q Okay. Correct me. 25 A My opinion -- I'm sorry?</p>
<p style="text-align: right;">Page 38</p> <p>1 client written documentation regarding the answer and 2 your opinion with respect to raising certain 3 affirmative defenses. 4 Q Any other opinions that you have regarding the 5 affirmative defenses in which you claim Attorney Palmer 6 failed to comply with the applicable standard of care? 7 A Well, I think, you know, he could have initiated -- the 8 plaintiff initiated discovery requests. He certainly 9 could have initiated discovery requests at the 10 beginning of the case, but it's my understanding that 11 you would want to squelch those or put them on hold if 12 you wanted to take advantage of an early settlement 13 offer from this particular attorney. 14 Q Are there any other opinions that you have that 15 Attorney Palmer failed to comply with the applicable 16 standard of care after the mediation? 17 A Nothing comes to mind right now, but you may ask a 18 question that will jog my memory. 19 Q And will you let me know if I do? 20 A I'll try to. 21 Q Now, as I reviewed Sections 9 and 10 of your report -- 22 let me ask it this way: In forming your opinions in 23 this case, what did you determine to be the appropriate 24 standard of care? 25 A I think the standard of care is that you have to act</p>	<p style="text-align: right;">Page 40</p> <p>1 Q Correct me, please. 2 A I think he had a duty to review the file for 3 affirmative defenses and identify possible affirmative 4 defenses. He then had a duty to decide whether he 5 thought it would be appropriate to plead them or not 6 plead them, and he had a responsibility to discuss that 7 with the client because ultimately it's going to be the 8 client's decision whether to assert the affirmative 9 defense or not. 10 So, for example, if he were to look at the file, 11 look at the affirmative defenses, and reach the 12 conclusions that Mr. -- again, if I'm mispronouncing 13 his name, tell me -- Mr. Heit, your expert -- 14 Q Hieb. 15 A -- he has a duty to -- Heath -- he has a duty to 16 communicate that information to his client so that his 17 client can make a decision. 18 To file an answer without communicating with your 19 client when your client has told you to "Run the answer 20 by me" and to file an answer without affirmative 21 defenses without having a chance to talk to your client 22 about it and discuss it with your client, it falls 23 below the standard of care. 24 Q Are you offering any opinions whether the failure to 25 include the proffered affirmative defense in this case</p>